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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1206

305 EAST 43RD STREET CORPORATION,

Petitioner,

against

ESKIL L. KARLSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

EDMUND F. LAMB,
Attorney for Petitioner,
Office & P. O. Address,
80 Broad Street,
New York, N. Y. 10004.

JUVENAL L. MARCHISIO,
On Petition.

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Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

305 East 43rd Street Corporation,

Petitioner,

against

Eskil L. Karlson,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, 305 East 43rd Street Corporation, prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, and the denial of a petition for a rehearing or rehearing in banc, affirming a judgment entered in the United States District Court for the Southern District of New York on March 29, 1966, in favor of respondent, Eskil L. Karlson, against petitioner, 305 East 43rd Street Corporation, in the amount of $150,000, upon a general jury verdict in an action for personal injuries sustained in a building located in the City of New York.

Motions of petitioner, for judgment n.o.v., pursuant to Rule 50(b), and for a new trial, pursuant to Rule 59 of the

Federal Rules of Civil Procedure, were denied by the District Court without opinion (Rec., Volume I, pp. 31a-32a).

The opinion of the Court of Appeals affirming the judgment of the District Court, is reported at 370 F. 2d 467 and a copy is appended hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on January 4, 1967. A copy is annexed hereto as Appendix C. The orders of the Court of Appeals denying the petition for rehearing with a suggestion for rehearing in banc were entered on February 2, 1967. Copies of said orders are annexed hereto as Appendices D and E.

Jurisdiction to review the judgment by writ of certiorari is invoked under 28 U.S.C. 1254(1) and 2101(c), as well as Rule 19.1(b) of this Court.

Questions Presented for Review

I

Whether a Federal Court in a diversity action involving liabilities and immunities of a property owner may impose liability for an injury occurring on the owner's premises without sanction in State law and contrary to State legislation.

Comprehended within this question in the present case, are the following questions:

1. Whether in a diversity action a Federal Court may disregard the clear and express language of a State Statute and interpret such Statute in a manner without sanction in State law.

2. Whether a Federal Court, in a diversity action, may completely repudiate State law on the question of proximate causation of an injury.

3. Whether, in the trial of a diversity action, a Federal Court may, in complete defiance of State law and without any sanction in Federal law, submit to a jury evidence of recent repair where there was no issue of control of the premises involved.

4. Is not a Federal Court, in a diversity action, required to apply State law principles respecting burden of proof on the issue of contributory negligence?

Statutes Involved

New York City Charter, Chapter 27, Section 666, adopted by referendum November 3, 1936, effective January 1, 1938.

Administrative Code of the City of New York, Chapter 929, Laws of 1937, Title C—Building Code, Article 1, Sections C26-2.0 and 3.0 and Article 14—Elevators—Sub-Article 2, Section C26-844.0-a.1.-c.2 and Sub-Article 8, Sections C26-1171.0 and 1172.0-a.

The Greater New York Charter, laws of 1901, Chapter 466 as amended by New York laws of 1916, Chapter 503, Section 718a.

Labor Law of the State of New York, Section 255.

The text of these Statutes is set forth in Appendix A.

Statement of the Case

The basis of Federal jurisdiction in the Court of first instance is diversity of citizenship between respondent, a citizen of the state of Connecticut and petitioner, a New York corporation, in an action for personal injuries demanding damages in excess of the jurisdictional amount of $10,000 exclusive of interest and costs.

Petitioner is the corporate owner of a five-story building located at 305 E. 43rd Street, New York City. Respondent was an employee of Haskins Laboratories, a tenant who had occupied the third, fourth and fifth floors of said building since about 1940 (Rec. Vol. I, p. 234a). The building was constructed in 1897 and was equipped with a single manually operated elevator which had been installed in 1920 (Rec. Vol. I, p. 150a) and which had been continued in use since then without significant alteration (Op. App. B., p. 29). There are still many thousands of such elevators in use in the City of New York (Rec. Vol. I, pp. 230a-231a).

The door to the elevator shaft was immediately opposite and faced the street door entrance to the building, over which there was a large three-panelled glass transom. To the right of the elevator shaftway as it is approached from the entrance to the building, there was a staircase leading to the upper stories. During normal business hours from Monday to Friday, petitioner supplied an operator for the elevator. On week-ends, because Haskins Laboratories frequently had ocasion to use the building, some of its employees, not including the plaintiff, had obtained permission to operate the elevator themselves. For this purpose a key to open the shaftway door was kept, over the week-end, under the bottom step of the staircase (Op. App. B., p. 30; Rec. Vol. I, pp. 56a, 95a-96a, 274a, 236a, 249a, 263a-264a, 276a).

On Sunday, October 8, 1961, when there was no employee of petitioner on the premises, a Haskins employee by the name of Epstein who had been authorized to use the elevator, entered the building and removed the elevator car to an upper floor using the key under the staircase to obtain entrance to the elevator. Before removing the car, however, he replaced the key under the staircase (Rec. Vol. I, pp. 248a-261a). Later in the day respondent entered the building, obtained the key from under the staircase, and proceeded to open the locked elevator door. Without taking precautions of any kind to ascertain that the car was

present, he proceeded to step into the car and fell down the shaft one story to the basement floor (Rec. Vol. I, pp. 98a-100a, 102a-103a).

At the time, natural daylight coming through the transom above the street door provided sufficient light for him to obtain the key, to insert it in the keyhole of the door, to see the floor of the vestibule in front of his feet and generally to observe what he was doing (Rec. Vol. I, pp. 55a-56a, 96a-97a). The elevator car was equipped with an accordian type metal gate which, when the elevator was not in use, would be pushed back in a folded position, and the upper half of the elevator car had light painted grille work which the plaintiff admittedly could have seen if the car had been there. The plaintiff did not see this grille work, nor did he observe the floor of the elevator car, nor did he feel around the door frame for the gate, as had Epstein before him (Rec. Vol. I, p. 255a). He admitted that at the time there was nothing to obstruct his vision (Rec. Vol. I, p. 103a).

The elevator was not and had never been equipped with an interlocking device which would have prevented opening the elevator door unless the car was at the landing. The Trial Court instructed the jury that it could consider as evidence of negligence the failure of the petitioner to comply with a rule of the New York State Board of Standards and Appeals requiring that elevators be equipped with an interlocking device "which shall prevent the opening of a hoistway door from the landing side unless the car is standing at that landing" (Rec. Vol I, pp. 13a-14a).

By the provisions of Chapter 929 of the Laws of 1937, the construction and maintenance of elevators in the City of New York is governed exclusively by the Administrative Code of the City of New York except as modified by the City Board of Standards and Appeals (App. A, Sec. C 26-1171.0-b., p. 25). By that Code, elevators legally installed prior to January 1, 1938 may be used without being

reconstructed. The only requirement respecting such elevators is that they "be maintained by the owner in a safe operating condition" (App. A, Sec. C26-844.0-c2., p. 25). The elevator in question admittedly conformed to existing law when it was installed in 1920. There had never been a violation placed against the elevator during its present ownership since 1939 (Rec. Vol. I, pp. 261a, 267a-270a).

The Court of Appeals in disregard of the clear legislative mandate of the New York State Legislature and in contravention of State case law has sustained the charge of the District Court and thus imposed upon a New York City property owner a responsibility from which he is exempt under State law.

At the trial the District Court allowed the respondent, over strenuous objection by petitioner (Rec. Vol. I, pp. 151a-157a), to introduce evidence that within a few days after the accident, the defendant had installed an interlocking device on the elevator door so that it could not be opened unless the car was at the landing, and to point out the device on pictures which had been introduced in evidence for the limited purpose of showing the general scene of the accident (Rec. Vol. I, pp. 217a-219a). The introduction of this evidence was in direct conflict with well settled New York State law, has no support or sanction in Federal law and, is in conflict with the decision of this Court in *Columbia & P.S. R.R.* v. *Hawthorne*, 144 U. S. 202 (1892).

Reasons for Granting the Writ

1. In this diversity action involving an injury occurring in a building within the City of New York, the Court of Appeals for the first time for any Court sitting within the State of New York has, by pure judicial fiat, made applicable to elevators installed in buildings within the City of New York prior to 1938, the rules of the New York State Board of Standards and Appeals.

This has been done in clear disregard of the language of the Administrative Code enacted by the Legislature of the State of New York by the New York Laws of 1937, Chapter 929, and in defiance of the legislative mandate of the New York Laws of 1916, Chapter 503, Section 718a. Section 718a of the Laws of 1916 gave exclusive jurisdiction to the New York City Board of Standards and Appeals in respect of rules and regulations affecting the construction, alteration and structural changes in elevators in the City of New York and mandated that its rules and regulations "shall take the place of the industrial code and of any rules or regulations of the labor department relating to the same subject matter."

The decision of the Court of Appeals in this case is an unabashed exercise of judicial legislation in a field not within the competence of a Federal Court. The effect of the decision is that a New York City property-owner has been held liable in the not unsubstantial amount of $150,000 for the violation of a rule of the State Board of Standards and Appeals which is wholly inapplicable to building owners within the City of New York.

By New York Laws of 1937, Chapter 929, the Legislature of the State of New York enacted the Administrative Code of the City of New York of which Title C, known as the Building Code, applies to "All matters, affecting or relating to the construction, alteration, demolition, or removal of structures erected or to be erected in the city" (App. A, Sec. C26-2.0, pp. 23-24). By Section C26-3.0, the purpose of Title C is stated to be "to provide standards, provisions and requirement for safe and stable design, methods of construction and sufficiency of materials in structures constructed, or demolished, after January first, nineteen hundred thirty-eight, and to regulate the equipment, maintenance, use and occupancy of all structures and premises" (App. A, p. 24).

By Section C26-844.0, it is stated that "The construction, maintenance, operation, inspections and tests of elevator

* * * device installations shall be as provided in this article and other applicable sections of this title, and the rules of the board, except as otherwise provided in subdivision c of this section." By subdivision c.2, of this Section, it is specifically provided that "Equipment legally installed prior to January first, nineteen hundred thirty-eight may be used without being reconstructed. Such elevators shall be maintained by the owner in a safe operating condition" (App. A. p. 25).

The New York City Charter, Chapter 27, provides by Section 666-3, that the New York City Board of Standards and Appeals shall have power: "To make, amend and repeal rules and regulations for the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in * * * elevators in * * * all buildings within the city, which shall take the place of the industrial code and of any rules and regulations of the department of labor of the state of New York relating to the same subject-matter." By Section 666-4, the City Board of Standards and Appeals is given the power "To exercise exclusively, with respect to buildings situated within the city, the same powers as are exercised by the department of labor of the state of New York elsewhere in the state" (App. A, p. 23).

The Courts below have not imposed liability upon the ground that petitioner failed to comply with any of the provisions of the Administrative Code relating to elevators within the City of New York, which contain similar provisions to those contained in the rules of the New York State Board of Standards and Appeals charged to the jury (Administrative Code, Secs. C26-902.0 and 903.0). To have so held would have been to fly in the face of a considerable body of decision in New York, including the United States Court of Appeals for the Second Circuit, giving effect to the prohibition against the application of Administrative Code provisions to structures erected or

elevators installed prior to 1938: *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F. 2d 239 (1965); *Moran* v. *Abercrombie & Fitch Company* (A. D. 1st Dept.), 22 A. D. 2d 779, 254 N.Y.S. 2d 33 (1964); *Fleming* v. *Fifth Avenue Coach Lines, Inc.* (A. D. 1st Dept.), 23 A. D. 2d 726, 257 N.Y.S. 2d 666 (1965). The Court of Appeals, rather, has justified the action of the Trial Court in holding that the elevator was subject to the State Board rules by a devious and specious process of reasoning which entirely disregards the fact that it is the duty of a federal court to apply state law as it is, and that it is not within its province to fashion state law as it believes it should be. This, in essence, is the principle of *Erie* v. *Tompkins*, 304 U. S. 64. See *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940); *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236 (1940).

Where there has been no definitive adjudication by the highest Court of Appeals of the state, the Federal Courts are required to apply state law as enunciated by intermediate Courts of Appeals of the state or even Courts of first instance. *Six Companies of California* v. *Joint Highway District No. 13 of the State of California*, 311 U. S. 180, 188 (1940), *Fidelity Union Trust Co.* v. *Field, supra*, at p. 178 (1940).

To arrive at its result, the Court below gratuitously interpolated into Section C26-844.0. c.2, which exempts equipment legally installed prior to January 1, 1938, from the specific provisions of Article 14 relating to elevators, the words "and maintained" after the word "installed". The same section, with respect to maintenance, merely provides that "Such elevators shall be maintained by the owner in a safe operating condition."

While not referring specifically to Section C26-844.0. c.2 of the Administrative Code, which was an enactment of the New York State Legislature, the Court likened this provision of the Code to an earlier similar provision contained

in the comprehensive rules adopted by the New York City Board of Standards and Appeals relating to elevators in 1931 (Op. App. B, p. 34). At the time the comprehensive rules referred to by the Court below were adopted by the New York City Board of Standards and Appeals in 1931, that Board had been given by subdivisions 3 and 4, Section 718a of the New York Laws of 1916 exclusive jurisdiction with respect to the regulation of elevators within the City of New York. It was specifically provided by subdivision 3 that "All rules and regulations made by the board pursuant to this section, *shall take the place* of the industrial code and of any rules or regulations of the labor department relating to the same subject matter" (App. A, p. 26; Op. App. B, pp. 32-33).

The rules adopted by the City Board in 1931 provided that elevators "legally installed prior to the adoption of these rules may be used without being reconstructed to comply with these rules" (Op. App. B, pp. 33-34). The Court below speciously reasoned that since the City Board had adopted no comprehensive rules prior to 1931, the rules of the State Board of Standards and Appeals adopted in 1923 had become applicable to the elevator in question which was erected in 1920, and that the 1931 exemption accorded to elevators legally installed prior to 1931 should not be interpreted according to its clear language, but as if it were limited to "elevators legally installed and maintained" (Op. App. B, p. 34).

This, the Court below did without any authority or sanction in state law and purely upon its own initiative. Similar provisions of rules of the Building Code of the City of New York then in effect had been held by the New York Court of Appeals to exclude from the specific provisions of the Code, buildings erected prior to its enactment, *McCabe* v. *Mackay*, 253 N. Y. 440, 171 N. E. 699 (1930).

With respect to the present Building Code, it has been specifically held by the Supreme Court of the State of

New York at Trial Term, Bronx County in *Rashid* v. *Weill*, 180 Misc. 815, 46 N.Y.S. 2d 711 (1944), that provisions of the Code relating to retaining walls could not be given effect under the multiple-dwelling law relating to buildings erected after April 19, 1929, since the building had been constructed in 1911. A similar result was arrived at by the Court of Appeals for the Second Circuit with respect to provisions of the Building Code, relating to lighting, in *Florentine* v. *Church of Our Lady of Mt. Carmel*, 340 F. 2d 239 (1965).

There is no decisional law in New York whatever which tends in the slightest to give support to the action of the Court of Appeals in the instant case in making the State Board rules applicable to the elevator involved. In addition, as indicative of the interpretation of the law as understood by the administrative body having control in the area involved, is the fact that no violation was ever placed upon this elevator during the ownership of the building by the petitioner since 1939 (Rec. Vol. I, pp. 267a-270a), although inspection of proper maintenance in accordance with the provisions of the Building Code and the rules of the city Board was required by Section C26-1172.0 four times a year (App. A, pp. 25-26). Moreover, respondent's expert, a former supervising inspector of buildings (Rec. Vol. I, p. 220a) admitted that elevators that had been erected prior to 1931 were not required to have a so-called "parking device" as a matter of rule or regulation (Rec. Vol. I, p. 229a). He also testified that as of 1930, although about 75 percent of the elevators then in use in the city were of the type here involved, about 50 percent of them had no such parking device (Rec. Vol. I, pp. 230a-231a).

As a result of the decision of the Court below, the petitioner, a property owner in the City of New York, has been cast in liability for injuries because of an unwarranted and purely gratuitous imposition upon it of an obligation from which it was immune under state law.

2. It has long been the settled law of New York that for negligence to be a proximate cause of injury, it must be the direct cause in a natural sequence or chain of events without the intervention of the act of any other person which was not reasonably foreseeable. *McLaughlin* v. *Mine Safety Appliance Co.*, 11 N. Y. 2d 62, 181 N. E. 2d 430 (1962); *Rivera* v. *City of New York*, 11 N. Y. 2d 856, 182 N. E. 2d 284 (1962); *Meyers* v. *120th Ave. Corp.*, 9 A. D. 2d 931, 195 N.Y.S. 2d 163, aff'd 11 N. Y. 2d 871, 182 N. E. 2d 291 (1962); *Bolsenbroek* v. *Tully & DiNapoli, Inc.*, 12 A. D. 2d 376, 212 N.Y.S. 2d 323, aff'd 10 N. Y. 2d 960, 180 N. E. 2d 61 (1961); *Morse* v. *Buffalo Tank Corp.*, 280 N. Y. 110, 19 N. E. 2d 981 (1939); *Saugerties Bank* v. *Delaware & Hudson R. Co.*, 236 N. Y. 425, 141 N. E. 904 (1923); *Perry* v. *Rochester Lime Co.*, 219 N. Y. 60 (1916).

In the present case there was a serious question whether, even if defendant was negligent, its negligence was a proximate cause of plaintiff's injury by reason of the intervening act of plaintiff's co-employee, Epstein, in placing the key to the elevator door back under the staircase, where it was available for use by another of Haskin's employees, instead of keeping it on his person when he removed the elevator from the first floor landing.

Petitioner had requested a charge on proximate causation in accordance with New York law and the Trial Court stated that this wold be covered in the charge (Rec. Vol. I, p. 22a, No. 11; p. 26a). However, the charge as given failed to include any charge whatever on proximate causation other than the statement that if "some negligence of the defendant was a substantial factor in bringing about the accident" and "no negligence of the plaintiff contributed to it, then the plaintiff is entitled to recover" (Rec. Vol. I, p. 13a). The Court specifically withdrew from the jury any consideration of the conduct of Epstein on the issue of proximate causation saying that if they found that the plaintiff was not guilty of some contributory negligence and that some negligence of the defendant was a

substantial factor in bringing about his injuries, "the fact that Mr. Epstein may have been negligent and that this negligence was a substantial factor in bringing about the injuries, does not exonerate the defendant from liability" (Rec. Vol. I, p. 15a). Due exception was taken (Rec. Vol. I, pp. 18a-19a). The Court of Appeals, in passing upon this claim of error, dismissed it summarily with the mere comment, "nor was there error in the instructions on the subject of causation. No particular formula is required".

New York has never adopted the substantial factor doctrine of proximate causation, but on the contrary has in effect rejected it. This is eminently apparent from its decisions in the cases of *Rivera* v. *City of New York* and *McLaughlin* v. *Mine Safety Appliances Co.*, both *supra*, decided in 1962. In *Rivera*, the Court wrote as follows (11 N. Y. 2d at p. 857):

> "It is clear in the present case that the condition of the bathtub's plumbing was not the proximate cause of the accident. The hot water created the specific injuries for which damages were sought and determined the gravity of the consequences resulting from the accident, but it did not cause the intervening act which was not foreseeable. (Ranney v. Habern Realty Corp., 281 App. Div. 278, 119 N.Y.S. 2d 192, aff'd 306 N. Y. 820.) The accident was caused by the slipping of a wet boot while the child balanced on the curved edge of the bathtub. (Lefkowitz v. Greenwich Sav. Bank, 293 N. Y. 711, 56 N. E. 2d 729)."

In *McLaughlin*, the New York Court of Appeals specifically held that it was reversible error for the Trial Court to fail to instruct the jury that the conduct of a third person could be an intervening cause which broke the chain of causation where plaintiff sustained injury from the application of heat blocks without additional insulation. Holding that there was sufficient evidence to sustain the jury's finding of negligence upon the ground of the rea-

sonable foreseeability of injury from the failure to give adequate warning of the need for additional insulation, the Court reversed for the failure to give an appropriate charge on proximate causation, saying (11 N. Y. 2d at p. 69):

> "But the true problem presented in this case is one of proximate causation, and not one concerning the general duty to warn or negligence of the distributor."

And (at p. 71):

> "In short, whether or not the distributor furnished ample warning on his product to third persons in general was not important here, if the jury believed that Traxler had actual notice of the danger by virtue of his presence at demonstration classes or otherwise, and that he deprived the nurse of her opportunity to read the instructions prior to applying the blocks. * * *"

In both of the cited cases, the claimed negligence was obviously a "substantial factor" in bringing about plaintiff's injuries; yet the New York Court of Appeals held that this was not sufficient to establish proximate causation.

In view of the settled New York law on the subject and the definite pronouncement of the New York Court of Appeals as recently as 1962 in *McLaughlin*, so closely analogous to the present case in principle, the decision of the Court of Appeals affirming the action of the Trial Court in this case deprived the petitioner of the benefit of the trial in accordance with New York Law to which he was entitled.

3. The trial court allowed respondent, over strenuous objection by petitioner (Rec. Vol I, pp. 151a-157a), to introduce evidence that immediately after the happening of the accident, petitioner installed an interlocking device on the elevator door (Rec. Vol. I, pp. 217a-218a). Counsel

for petitioner had stipulated that he was raising no issue as to possession and control (Rec. Vol. I, p. 151a) and respondent stipulated that he was making no claim of faulty maintenance (Rec. Vol. I, p. 266a). The only purpose of the introduction of such testimony could have been for its prejudicial effect (See the last question on p. 217a, Rec. Vol. I). It is well settled in the law of New York that evidence of "changes or repairs made in an appliance, structure or machine which caused an accident is not an admission of negligence in having maintained the appliance, structure, or machine in its former condition" and may not be admitted as evidence. *Dougan* v. *Champlain Transportation Co.*, 56 N. Y. 1 (1874); *Corcoran* v. *Village of Peekskill*, 108 N. Y. 151 (1888); *Getty* v. *Town of Hamlin*, 127 N. Y. 636 (1891); *Hadges* v. *New York Rapid Transit Corporation*, 259 App. Div. 154, 18 N.Y.S. 2d 304 (1st Dept., 1940); *Danielson* v. *City of New York*, 283 App. Div. 1019, 131 N.Y.S. 2d 136 (1st Dept., 1954); *Del Riccio* v. *Montwill Corporation*, 16 A. D. 2d 971, 230 N.Y.S. 2d 501 (2nd Dept., 1962).

In *Columbia & Puget Sound R. Co.* v. *Hawthorne*, 144 U. S. 202 (1892), this court reversed a judgment in favor of plaintiff where such evidence was admitted, saying:

> "But it is now settled, upon much consideration, by the decisions of the highest courts of most of the states in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."

The only exception to this principle in New York law is that evidence of subsequent repair may be admitted in

cases where there is an issue between a landlord and a tenant as to the landlord's retention of control of the leased premises. *Scudero* v. *Campbell*, 288 N. Y. 328, 43 N. E. 2d 66 (1942); *Antonsen* v. *Bay Ridge Sav. Bank*, 292 N. Y. 143, 54 N. E. 2d 338 (1944); *Noble* v. *Marx*, 298 N. Y. 106, 109-110, 81 N. E. 2d 40 (1948). It was admitted in the present case that petitioner was the owner of the building. It was conceded in the pretrial order that it had "maintained" the elevator and counsel for petitioner stipulated that he was raising no issue of control (Op. App. B, p. 35). Moreover, no issue with respect to petitioner's possession or control of the elevator was ever submitted to the jury.

The only justification for the admission of this evidence given by the trial court or by the Court of Appeals, was that the device appeared on photographs which had been admitted in evidence pursuant to a stipulation in the pretrial order "that the photographs fairly and accurately represent the scene of the accident" (Rec. Vol. I, p. 304a). Use of photographs admitted for the limited purpose of showing the scene of the accident to evidence a repair or change in condition after the accident has been specifically condemned by the Court of Appeals of the State of New York in *Cahill* v. *Kleinberg*, 233 N. Y. 255, 259-260 135 N. E. 323 (1922).

Taken together with the charge that the plaintiff could be found guilty of negligence in not equipping the elevator door with an interlocking device, the testimony of the installation of such a device within a few days after the accident was so clearly prejudicial to the defendant as to have deprived it of a fair trial.

4. As was recognized by the court below in *Tropea* v. *Shell Oil Company* (1962), 307 F. 2d 757 at page 767:

> "The general rule in New York is clear-cut and well established:

> 'A plaintiff who negligently subjects himself or his property to a risk of harm from a defendant's negligence may not recover for injury resulting therefrom, except as the doctrine of last clear chance is applicable.' *Storr* v. *New York Cent. R. Co.*, 261 N. Y. 348, 351, 185 N. E 407, 408 (1933)."

That the plaintiff has the burden of proving that the injury did not result from any negligence on his part contributing thereto is traditional in New York law. Thus, in *Whalen* v. *Citizens' Gas Light Co.*, 151 N. Y. 70, the Court of Appeals for this state in 1896 wrote as follows (at p. 73):

> "It is the well-settled law of this state that, in actions of this character, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury."

Of particular application to the present case are the comments of the Court of Appeals in that case (at p. 74):

> "It is not pretended that anything occurred that momentarily obstructed her vision, and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard of the precautions usually taken by careful and prudent people."

As recently as 1962, the New York Court of Appeals in *Nucci* v. *Warshaw Construction Corp.*, 12 N. Y. 2d 16, 186 N. E. 2d 401 wrote as follows (12 N. Y. 2d at p. 19):

> "In the face of a cautious alternative, plaintiff chose to walk with his eyes open (both figuratively and literally) into a condition which he contends *defendants* ought to have foreseen would cause injury, and has

thus impaled himself on the horns of a dilemma, both of which dictate a dismissal of the complaint. (Utica Mut. Ins. Co. v. Amsterdam Color Works, 284 App. Div. 376, 131 N.Y.S. 2d 782, aff'd 308 N. Y. 816; Townes v. Park Motor Sales, 7 A. D. 2d 109, 180 N.Y.S. 2d 553)."

In the present case, there can be no dispute as to plaintiff's conduct. There was no witness to his accident, and his case depends upon his own testimony. On direct examination, he testified that after entering the front door, he proceeded to get the key from underneath the steps; that he had sufficient light to see what he was doing, although he didn't think that he could read a paper there; and that after opening the elevator door, although it was darker in the shaft than in the vestibule, he stepped in, reaching down for the light switch of the elevator car and fell into the shaft (Rec. Vol. I, pp. 55a-56a).

On cross examination, he admitted that the upper half of the elevator car had a light-painted grill work which he should have been able to see if it was there, but didn't see; that he could see the floor of the vestibule in front of his feet, but didn't see the floor of the elevator car; that there was nothing that would have prevented him from seeing what he should have seen; and that he, nevertheless, stepped forward, reaching over for the elevator light switch, and fell into the vacant shaftway (Rec. Vol. I, pp. 98a-103a).

If the light in the vestibule was insufficient to see into the shaftway, then the plaintiff was equally chargeable with contributory negligence in admittedly proceeding into the darkened elevator shaft. This principle is so well established in New York as to be, in effect, Hornbook law. See *Piper* v. *N.Y.C. & Hudson River R. Co.*, 156 N. Y. 224 (1898); *Rohrbacher* v. *Gillig*, 203 N. Y. 413, 417-418 (1911); *Brown* v. *Associated Operating Co.*, 165 App. Div. 702,

151 N.Y.S. 531, 532, aff'd 222 N. Y. 566 (1917); *Bragg* v. *Smilowitz,* 16 A. D. 2d 181, 226 N.Y.S. 2d 755, affd. 12 N. Y. 2d 769, 186 N. E. 2d 566 (1962).

Of particular significance is the *Piper* case wherein, in an action against a railroad company, the Court wrote as follows (156 N. Y. at p. 228):

> "He has the right to rely upon the performance by the railroad company of its duty to exercise the utmost degree of care and skill which human prudence and foresight can suggest in transporting him; but that does not relieve him from the duty of using his own senses of sight, hearing and perception."

Petitioner does not challenge the charge to the jury on the question of contributory negligence, but raises the question as to whether or not under the proof in this case, the plaintiff carried the burden of proof imposed upon him to prove his freedom from contributory negligence. As to this burden of proof, the Appellate Division for the Second Department of the State of New York in *Tornambe* v. *Tornambe,* 16 A. D. 2d 680, 227 N.Y.S. 2d 237, aff'd 12 N. Y. 2d 1003, 189 N. E. 2d 625 (1963), stated the principle applicable in New York courts as follows:

> "Plaintiff failed to show, either by direct proof or by circumstantial evidence, her freedom from contributory negligence. No presumption that she was free from blame arises from the mere happening of an injury and from proof that defendant was, or might have been negligent (Weston v. City of Troy, 139 N. Y. 281, 282, 34 N. E. 780, 781). When, as in this case, circumstances point as much to the negligence of of the plaintiff as its absence, or point in neither direction, a nonsuit should be granted (Wiwirowski v. Lake Shore & Mich. So. Ry. Co., 124 N. Y. 420, 425, 26 N. E. 1023, 1024)."

In *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437 (1959), this Court said (at p. 446):

> "Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' and hence respondent was required to shoulder the burden during the instant trial."

This has been held to apply specifically to plaintiff's burden of proving his freedom from contributory negligence: *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1942).

There has been no suggestion in this case that there is any difference between federal law and New York law as to the sufficiency of evidence to present a jury question, but the Court of Appeals for the Second Circuit has at least twice held that the standards under New York State law and federal law are substantially identical, *Presser Royalty Company* v. *Chase Manhattan Bank*, 272 F. 2d 838, 840 (1959); *O'Connor* v. *Pennsylvania Railroad Co.*, 308 F. 2d 911, 914 (1962).

Clearly under state law, in view of the decisions above cited, particularly *Tornambe* v. *Tornambe*, the plaintiff's proof in the present case failed to establish sufficient evidence to carry his burden on this issue, and his complaint either should have been dismissed on petitioner's motion at the close of his case (Rec. Vol. I, pp. 243a-245a), or at least a new trial should have been granted since the verdict in the plaintiff's favor was contrary to the evidence on this issue.

Conclusion

The decision herein is in direct conflict with the decision of the Appelllate Division, First Department, Supreme Court of the State of New York rendered on November 19, 1964 in the case of *Moran* v. *Abercrombie & Fitch Company*, 22 A. D. 2d 779, 254 N.Y.S. 2d 33, involving an

injury by falling into the shaft of an elevator installed in 1917 when the door was opened, as here, by the use of a key, and the car was not at the landing.

It is abhorrent to the *Erie* doctrine that "the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away" should lead to a substantially different result; for, in enforcing a state-created right, a federal court is in substance "only another court of the state." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108-109 (1944). See also *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203 (1955).

The *Erie* rule as stated by this Court in *Hanna* v. *Plumer*, 380 U. S. 460, 467 (1965), "is rooted in part in the realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."

"It is inadmissible," this Court said, in *Fidelity Union Trust Co.* v. *Field, supra,* at p. 180, "that there should be one rule of State law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the status of diversity of citizenship".

Unless petitioner was accorded a proper and fair trial under New York law, it did not have the benefit of a trial under law at all, for there is no other system or body of law applicable to the determination of its liability herein. In the absence of such a trial, petitioner has been deprived of its property to the extent of a $150,000 judgment without due process of law.

This case is of importance not only to petitioner, although it is submitted that under Rule 19.1(b) of this Court this in itself would be sufficient to justify certiorari, but is also of importance to numerous property owners within the City of New York. The plaintiff's expert, a former supervising inspector of elevators for the New

York City Department of Buildings, testified that there were 50,500 elevators in the Borough of Manhattan alone, and that of these, there are still about 35 percent of the manually-operated type similar to the elevator involved in this case (Rec. Vol. I, pp. 230a-231a). Considering that there are five boroughs within the city, it is apparent that there are a vast number of building owners within the City of New York who can be affected by this decision. By a comparison of the decision of the court in this case with the decision of the Appellate Division, First Department in the case of *Moran* v. *Abercrombie & Fitch Company, supra,* the effect of the present decision is that there will be one rule applicable to non-residents for injuries arising from the maintenance of such elevators and an entirely different rule applicable to residents of the City of New York for such injuries. This is precisely the type of result that the *Erie* rule was designed to prevent.

For the foregoing reasons, this petition for certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

EDMUND F. LAMB,
Attorney for Petitioner.

Dated: New York, New York.
March 28, 1967.

JUVENAL L. MARCHISIO,
On Petition.

APPENDIX A.

Statutes Involved

THE NEW YORK CITY CHARTER

CHAPTER 27

BOARD OF STANDARDS AND APPEALS

* * * * *

§ 666. **Jurisdiction.**—The Board shall have power:

* * * * *

3. To make, amend and repeal rules and regulations for the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in, plumbing and drainage of, elevators in, fire escapes on, adequacy and means of exit from and fire protection in all buildings within the city, which shall take the place of the industrial code and of any rules and regulations of the department of labor of the state of New York relating to the same subject-matter.

4. To exercise exclusively, with respect to buildings situated within the city, the same powers as are exercised by the department of labor of the state of New York elsewhere in the state.

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

N. Y. Laws of 1937, Chapter 929

TITLE C

BUILDING CODE

ARTICLE 1

GENERAL PROVISIONS

* * * * *

Appendix A.

§ C26-2.0 **Matter covered.**—All matters, affecting or relating to the construction, alteration, demolition, or removal of structures erected or to be erected in the city, are presumptively provided for in this title. This title does not provide presumptively for matters that are contained in the charter, the labor law, the multiple dwelling law, the general city law, the building zone resolution, or in the rules promulgated in accordance with the provisions of this title by the board. This title does not apply to railroads owned by the city, or the title to which is in a board of transit control under the public service law, nor to the stations, yards, shops, power houses, transforming substations, or any other buildings or structures thereof.

§ C26-3.0 **Purpose.**—The purpose of this title is to provide standards, provisions and requirements for safe and stable design, methods of construction and sufficiency of materials in structures constructed, or demolished, after January first, nineteen hundred thirty-eight, and to regulate the equipment, maintenance, use and occupancy of all structures and premises.

ARTICLE 14

Elevators

SUB-ARTICLE 2

Administrative Provisions for Elevators

§ C26-844.0 **Application and scope of this article.**—a. Application.—

1. The construction, maintenance, operation, inspections and tests of elevator, dumbwaiter, escalator or amusement device installations shall be as provided in this ar-

ticle and other applicable sections of this title, and the rules of the board, except as otherwise provided in subdivision c of this section.

• • • • •

c. Existing installations.—

• • • • •

2. Equipment legally installed prior to January first, nineteen hundred thirty-eight may be used without being reconstructed. Such elevators shall be maintained by the owner in a safe operating condition.

SUB-ARTICLE 8

Inspection, Maintenance and Operation

• • • • •

§ C26-1171.0 **Responsibility.**—a. Responsibility of owner. —The owner of the structure, in which an elevator, escalator or dumbwaiter is installed, shall be responsible for the safe operation and proper maintenance of such elevator, escalator or dumbwaiter, after such elevator, escalator or dumbwaiter has been approved by the superintendent.

b. Responsibility for inspection and maintenance.—The owner of the structure, in which an elevator, escalator or dumbwaiter is installed, or his duly appointed agent shall cause periodic inspections to be made of all parts of each elevator, escalator, and dumbwaiter installation. Such owner or agent shall maintain all parts of such elevator, escalator and dumbwaiter installation in proper working order in accordance with the provisions of this title and the rules of the board.

§ C26-1172.0 **Inspection.**—a. All hoistway doors, car gates, interlocks, contacts, control apparatus, controllers,

automatic stops, limit stops, car and counterweight cables, safeties, guide rails, buffers, elevator machines and the lighting of the cars and of the machine rooms, in passenger and freight elevator installations, shall be thoroughly inspected by the superintendent at least four times a year.

N. Y. Laws of 1916, Chapter 503, Sec. 718a.
Jurisdiction

§ 718a. The board shall 1. Have power to test materials to be used pursuant to law, and to make investigations concerning all matters relating to the enforcement and effect of the provisions of this chapter, the building code, and the rules and regulations made by the board;

2. Make, amend and repeal rules and regulations for carrying into effect the provisions of the laws, ordinances and rules and regulations in respect of any subject or matter, jurisdiction whereof is conferred upon the board by this act, or upon a superintendent of buildings by title two of chapter nine of this act or by ordinance or upon the fire commissioner by title three of chapter fifteen of this act or by ordinance, and to include in such rules and regulations provisions applying to specific conditions and prescribing means and methods of practice to effectuate such provisions and for carrying into effect the powers of the board. Such rules and regulations shall take the place of rules and regulations made by a president of a borough, a superintendent of buildings or the fire commissioners;

3. Make, amend and repeal rules and regulations regarding the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration, structural changes in, plumbing and drainage of, elevators, fire escapes on, adequacy and means of exit from and fire alarm systems in all buildings, except tenement houses, within the city of New York.

All rules and regulations made by the board pursuant to this section, shall take the place of the industrial code and of any rules or regulations of the labor department relating to the same subject matter;

4. Exercise exclusively with respect to buildings situated in the city of New York, the same powers as are conferred upon the industrial commission by chapter seven hundred nineteen of the laws of nineteen hundred and fifteen.

* * * * * *

LABOR LAW

§ 255. **Elevators and hoistways.**

In all factory buildings, every elevator and elevator opening and the machinery connected therewith and every hoistway, hatchway and well-hole shall be so constructed, guarded, equipped, maintained and operated as to be safe for all persons; the board shall adopt rules to carry into effect the provisions of this section.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—September Term, 1966.

(Argued November 2, 1966 Decided January 4, 1967.)

Docket No. 30668

ESKIL L. KARLSON,

Plaintiff-Appellee,

305 EAST 43RD STREET CORPORATION,

Defendant-Appellant.

Before:

MEDINA, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge.*

305 East 43rd Street Corporation appeals from a judgment entered upon the verdict of a jury in an action to recover damages for personal injuries suffered by Eskil L. Karlson when he fell down an elevator shaft in a building owned and controlled by appellant. No opinion below. Affirmed.

Appendix B.

CHARLES F. KRAUSE, New York, N. Y. (Speiser, Shumate, Geoghan & Krause, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (William E. Fay, III and Purdy, Lamb & Catoggio, New York, N. Y., on the brief), *for defendant-appellant.*

MEDINA, *Circuit Judge:*

A New York corporation, owner of a building in New York City, appeals from a judgment entered upon a verdict in the amount of $150,000 after the trial before Judge McGohey of an action for damages for personal injuries suffered by Eskil L. Karlson, a Connecticut commuter, as the result of a fall into an elevator shaft. Jurisdiction is based on diversity and New York law governs throughout.

While the building owner claims that Karlson was guilty of contributory negligence and various miscellaneous errors are charged, the principal contention in our view of the case relates to the law applicable to the maintenance of a safety device to prevent access to the elevator shaft when the car is not at the landing. As we find no merit in any of these contentions we affirm.

Karlson was an employee of Haskins Laboratories which had its office in a five-story building in Manhattan owned by appellant, 305 East 43rd Street Corporation. The building contained a single, manually operated elevator that had been in use since its installation in 1920 without significant alteration. During business hours appellant supplied an operator but at other times, with some exceptions, occupants of the building were forced to walk up the stairs.

Because employees of Haskins frequently were in the building on weekends, some few of them sought and ob-

tained permission to operate the elevator themselves. Although Karlson was not included in this group, he learned how to use the elevator from appellant's operator, as apparently had most other Haskins employees, and it was his habit to use the elevator when he was in the building on Sundays.

On previous Sundays Karlson came to the street door, opened it with a key he had been given for the purpose, closed the street door and found himself in a vestibule facing and about 10 or 12 feet from the closed solid doors to the elevator shaft. There was a large three-panelled glass transom above the street door and this provided sufficient light for him to see what he was about but he did not think he "could read a paper in there." There was an electric light fixture overhead but he had never seen it lighted on other Sundays and he had not been shown where the switch was to turn on this light. He then walked over to the stairway and picked up the key to the elevator that was customarily kept under the bottom step, in accordance with instructions previously given to him by employees of the building, and he used this key to open the closed solid doors leading to the elevator. He pulled out the door to his right, then leaned over and reached inside to turn on the light in the elevator. The light switch was in the car at about knee level. He then put the key back under the stairs, entered the elevator car that was always there at the landing, turned on the power, closed the folding gate and ran the car up to the fifth floor where his research laboratory was.

On October 8, 1961 he arrived at the building at about one o'clock in the afternoon and did just what he had done on the earlier Sundays. But on this occasion Robert Epstein, also a Haskins employee, had already run the elevator car to one of the upper floors and he had put the key back under the stairs. Expecting to find the elevator car at the landing, Karlson got the key from under the

stairs, opened the door leading to the elevator, reached forward to turn on the light and fell headlong into the shaft. If the door had been equipped with an interlocking device it could not have been opened unless the car was at the landing.

I.

In his instructions to the jury Judge McGohey said:

> The statute of the State of New York provides—and this is a quotation: "In all factory buildings every elevator and elevator opening and the machinery connected therewith, and every hoistway, hatchway and well hole shall be so constructed, guarded, equipped, maintained and operated as to be safe for all persons; the Board shall adopt rules to carry into effect the provisions of this section."
>
> Under the authority of this statute which I have just quoted the State Board of Standards and Appeals has adopted the following rule: "All manually operated hoistway doors shall be provided with an interlock or electrical contact or other approved devices performing similar functions."
>
> The function of the interlock is defined in another provision as follows: "An interlock is a device which shall prevent the opening of a hoistway door or doors from the landing side unless the car is standing at that landing."
>
> * * * * *
>
> Now, if you find that the defendant violated any of the foregoing provisions such violations would constitute evidence of negligence and you may consider it as evidence of negligence.

If this was error we must remand for a new trial, even if there was other proof from which the jury might have

inferred negligence on the part of the building company. This is not only because the verdict was probably based on the failure to provide an interlock as at least the most likely of possible causes of the accident, but because there is surely nothing to give assurance that the verdict was not based on the failure to provide an interlock. If, instead of laboring the other acts of alleged negligence, appellee had performed the task of thorough research into the background of state laws, New York City Charter provisions and the ordinances and regulations promulgated by a variety of State and City administrative bodies or agencies, as we have been required to do, appellee's brief would have been more helpful to us.

Appellant argues that the above-quoted rule of the State Board of Standards and Appeals is not applicable to elevators located within the City of New York because exclusive jurisdiction over such elevators is lodged in the City Board of Standards and Appeals by virtue of the New York City Charter. The resolution of this question requires extensive analysis of the historical development and interrelationship of various statutes, City ordinances and regulations passed from time to time for the purpose of making elevators and the operation thereof safe in buildings situated in the City of New York.

In 1916 the New York State legislature, by means of an amendment to the Greater New York Charter, established a City Board of Standards and Appeals. The jurisdiction of this Board included the power to "Make, amend and repeal rules and regulations regarding the enforcement of those provisions of the labor law and other laws which relate to the construction, alteration [and] structural changes in * * * elevators * * * within the city of New York." The statute further provided: "All rules and regulations made by the board pursuant to this section, shall take the place of the industrial code and of any rules or regulations of the labor department relating to the same subject matter." N. Y. Laws, 1916, chap. 503, Section 718-a.

In granting the City Board of Standards and Appeals this authority, it is clear that the application of state statutes in the City of New York was not automatically terminated but that the City by affirmative act could but was not required to preempt state regulation. When the City first undertook to regulate elevators in 1918, it did so by incorporating state law.

> Every elevator * * * within the City of New York, in addition to conforming to all provisions of the labor law, building code or other laws or ordinances as are applicable thereto, shall comply with the provisions of these rules. 3 Bull. Board of Standards & Appeals 955 (1918).

Not until 1931 did the City itself undertake comprehensive regulation.

In 1923, however, pursuant to the authority granted to it by the State Labor Law, the State Board of Standards and Appeals adopted regulations requiring all elevators, with exceptions not here relevant, to be equipped with interlocking devices. New York State Industrial Code § 420 (f). As these regulations must be deemed a part of the Labor Law insofar as they establish rules governing the maintenance of elevators, this particular State rule requiring interlocking devices became applicable to the elevator in 305 East 43rd Street, New York City, on its effective date, March 1, 1923. Thus from 1923, the elevator involved in this accident was operated in violation of the applicable regulations.

The question then is whether any later action by the City had the effect of dissolving these violations and of reducing the standards for the safe operation of elevators in the City of New York. The 1931 revision by the City Board of Standards and Appeals provided that elevators "legally installed prior to the adoption of these Rules may

be used without being reconstructed to comply with these Rules." When this particular elevator was installed in 1920 it conformed to the then existing law. But we do not believe the word "installed" in the 1931 revision should be read to mean the date of construction. Such a reading would lead to the absurd conclusion that all elevators located within New York City were governed by the various rules in effect on the date of their construction. Rather, we think that by the use of the word "installed," the draftsman intended to refer to the legality of the elevator as of 1931. That is to say, the regulation should be read as "elevators legally installed and maintained" prior to 1931 may be used "without being reconstructed." To hold the contrary would wipe out eight years of continuous violations in this very building and reduce the safety standards applicable to this class of elevators. A result so unusual could be supported only if there was before us clear proof that the City Board of Standards and Appeals intended such a result. No such proof, however, has been forthcoming and our research has found none.

The current New York City regulations are contained in the Administrative Code of 1938. The provisions of this codification, similar to the 1931 regulations, apply only prospectively. Elevators "legally installed" may be used without change. As this provision parallels that contained in the 1931 regulation, it must be similarly construed.

Thus there is nothing which excludes the application of the State Labor Law and the regulations adopted pursuant to that law require that the elevator involved in this suit be equipped with an interlocking device. Judge McGohey's charge was proper.

Appellant argues that Section 666 of the New York City Charter confers upon the City Board of Standards and Appeals exclusive jurisdiction over elevators within the City of New York, and that, therefore, no State law or regulation could apply. Apparently, appellant was un-

aware of the 1918 City regulation which incorporated State law. All subsequent City enactments continued this incorporation, as we have shown.

II.

Appellant further complains of the admission of evidence that immediately following Karlson's accident appellant installed an interlocking device. Under both New York and federal law such evidence is admissible only if it bears on a disputed issue of control. *Hadges* v. *New York Rapid Transit Corp.*, 259 App. Div. 154, 18 N. Y. S. 2d 304; *Columbia & P. S. R.R.* v. *Hawthorne*, 144 U. S. 202 (1892); see 2 Wigmore, Evidence § 283(4). Whether and to what extent, any issue of control remained in the case by the time of trial is unclear.

In its answer, appellant did not admit that it controlled the elevator or, more specifically, it denied that it controlled the elevator on the day of the accident. In the pre-trial order, it was agreed that "no amendments to the pleadings are allowed" and that "no issues raised by the pleadings are abandoned." Appellee, both to meet the issue of control and to show the scene of the accident, put in evidence a photograph of the elevator taken after the safety lock was installed. See 2 Wigmore, Evidence § 283(4). While the device was open to the view of anyone looking at the photograph, including any juror familiar with such matters, no comment on the subject was made by either counsel at the time the photograph was received in evidence. Later during the trial when appellee sought to bring up the question of repairs, appellant strenuously objected. Appellant argued there was no issue of control in general framed by the pleadings but only of control on the day of the accident and further that in the pre-trial order it had conceded that it "maintained" the elevator. Counsel for appellant then insisted he had no intention to dispute the issue of control.

Appendix B.

Judge McGohey concluded that the appellee should be permitted to prove and to explain the presence of the safety device to prevent adverse and unwarranted inferences by the jury. We think appellant is chargeable with much of the confusion surrounding this issue of control and should have objected to the photograph when it was offered in evidence if it wished to keep the evidence of repairs from the jury. Moreover, when the evidence of the installation of the interlock was received, Judge McGohey instructed the jury that they must restrict their consideration of this evidence to the limited issue of control, which was also explained to the jury, and that no other inferences might be drawn. Under the circumstances of this case we think this was sufficient.

We think the issue of contributory negligence was clearly for the jury to determine. Nor was there error in the instructions on the subject of causation. No particular formula is required. Other claims of alleged error have been considered by us but we find them devoid of merit.

The verdict is large but not so large as to give us the impression that a reversal or remittitur is necessary to prevent a gross miscarriage of justice. *Dagnello* v. *Long Island R.R. Co.*, 289 F. 2d 797 (2 Cir. 1961).[1] The proofs show permanent physical injuries including a permanent impairment of memory and ability to communicate. Karlson is a physicist with a life expectancy of about thirty years. The jury might well have concluded that his earning capacity, which was superior prior to the accident, had been substantially reduced.

Affirmed.

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[1] As remittitur concerns the relationship between the federal judge and jury, it is a question of federal law. *Byrd* v. *Blue Ridge Rural Electric Cooperatives, Inc.*, 356 U. S. 525 (1958).

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of January, one thousand nine hundred and sixty-seven.

Present: HON. HAROLD R. MEDINA,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

ESKIL L. KARLSON,
Plaintiff-Appellee,

v.

305 E. 43RD STREET CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

APPENDIX D.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and sixty-seven.

Present: Hon. Harold R. Medina,
Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Circuit Judges.

Eskil L. Karlson,
Plaintiff-Appellee,

v.

305 E. 43rd Street Corporation,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk.

APPENDIX E.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of February, one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

ESKIL L. KARLSON,
Plaintiff-Appellee,

v.

305 E. 43RD STREET CORPORATION,
Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

SUPREME COURT, U.S.

FILED

APR 29 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1206

305 EAST 43RD STREET CORPORATION,

Petitioner,

against

ESKIL L. KARLSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STUART M. SPEISER
Attorney for Respondent
Office & P. O. Address
200 Park Avenue
New York, N. Y. 10017

CHARLES F. KRAUSE
WILLIAM F. X. GEOGHAN, JR.
ALFRED W. GANS
On Brief in Opposition

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Supreme Court of the United States

OCTOBER TERM, 1966

No. .....,

305 EAST 43RD STREET CORPORATION,

Petitioner,

against

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Eskil L. Karlson, urges that the writ of certiorari which the petitioner seeks be denied. As stated on page 1 of petitioner's brief, the writ is sought to review the decision and judgment of the United States Court of Appeals for the Second Circuit, and the denial of a petition for a rehearing or rehearing *in banc,* affirming a judgment entered in the United States District Court for the Southern District of New York on March 29, 1966, in favor of respondent, Eskil L. Karlson, against petitioner, 305 East 43rd Street Corporation, in the amount of $150,000.00,

upon a general jury verdict in an action for personal injuries sustained from a fall down an elevator shaft in a building located in the City of New York and owned by petitioner. The opinion of the United States Court of Appeals, affirming the judgment of the District Court, is reported at 370 F. 2d 467 and is reprinted in Appendix B attached to the brief of petitioner.

Petitioner's post-trial motions were denied by the District Court without opinion.

Jurisdiction

The judgment and later orders of the Court of Appeals were entered as stated by petitioner on page 2 of its brief, with copies attached to petitioner's brief as Appendices (C), (D), and (E).

Petitioner is seeking to review the judgment by writ of certiorari, under Rule 19.1(b) of this Court, which provides for a review on writ of certiorari in the exercise of sound judicial discretion where a Court of Appeals has decided an *important* state question in a way *in conflict* with applicable state law.

Questions Presented for Review

Basically the problem presented is whether this Court will review the decisions and judgments of two Federal Courts below in a diversity action involving solely questions of state law, as to the liability of the owner of a building containing an elevator, for injuries sustained by the respondent herein from a fall down the elevator shaft. This presents, fundamentally: narrow questions of state law as to

the construction and application of certain state statutes and rules; simple substantive questions of state law as to the correctness of the charge of the trial court on questions of proximate cause and as to such matters as burden of proof of contributory negligence; and a question of evidence as to whether a photograph was improperly admitted into evidence which showed a change in the elevator device after the accident occurred.

Comprehended within the foregoing simple and narrow state law issues are certain "subdivided" questions:

1. Whether this Court, in a diversity action involving only the state law of New York, will review the concurring decisions of two Federal Courts below as to the construction, interpretation and effect of New York statutes—and certain rules adopted pursuant to such statutes—and whether a problem of such narrow scope as to state law is a matter of such magnitude and importance presenting special reasons for review that this Court will make a second review as to these questions of construction.

2. Whether this Court, in a diversity action involving only the law of New York, will review the agreeing decisions of the two courts below as to whether the trial court properly instructed the jury, under New York law, on a simple question of proximate causation.

3. Whether this Court, after trial of a diversity action, will review the concurring judgment of two courts below as to whether evidence was improperly submitted to a jury, by way of a photograph, which indicated a change after an accident, where both courts below have held that there was an issue of control of the premises involved so that, as in-

structed carefully by the trial judge, the jury would have to limit their consideration of such evidence to a limited issue of control which also was explained to them.

4. Whether this Court, in a diversity action involving only New York law, will review the concurring decisions and judgments of the two courts below in their application of principles of New York law respecting burden of proof on an issue of contributory negligence.

Statutes Involved

In addition to the statutes recited by the petitioner on page 3 of its brief, there also is involved in this case a Bulletin of the New York City Board of Standards and Appeals, adopted in 1918, being 3 Bull. Board of Standards & Appeals 955 (1918).

Rule 400 of the New York State Industrial Code, defining "interlock," promulgated pursuant to the New York State Labor Law §§28, 255, and contained in Bull. 8 of the State Labor Department, is also involved.

Rule 420, particularly subdivision (f) thereof, requiring an interlock in all manually operated hoisting doors or gates, of the New York State Industrial Code, also promulgated pursuant to the aforesaid sections of the New York Labor Law and likewise contained in Bull. 8 of the State Labor Department, is similarly concerned.

Also involved is §316 of the Labor Law of New York, admitted to be applicable by petitioner.

The text of the 1918 Bulletin of the City Board of Standards & Appeals, of the two rules promulgated pursuant to

the New York Labor Law by the State Labor Department, and §316 of the Labor Law, are set forth in Appendix attached hereto.

Statement of the Case

The basis of federal jurisdiction is diversity of citizenship, and New York law controls as to the substantive rights and liabilities of the parties litigant.

Although the building in which this accident occurred was constructed in 1897, the manually operated elevator involved in the accident was not installed until 1920. Consequently it was later in date than the 1916 Charter of New York as amended by the 1916 laws, contained in Appendix A, page 26 of the brief of petitioner, and also was installed later than the 1918 Bulletin of the City Board of Standards and Appeals (referred to in the opinion of the Court of Appeals, Appendix B, at page 33 of petitioner's brief, and set forth in Appendix, page 23, attached to this brief) which incorporated state law as to regulation of elevators by specifically providing that every elevator within the City of New York shall conform to all provisions of the Labor Law, Building Code, or other laws or ordinances as are applicable thereto. Consequently, when this elevator was installed in 1920, it was installed subject to all the state Labor Law or Building Code provisions which would govern as to elevators.

In 1923, the State Board of Standards and Appeals, pursuant to the authority granted to it by the State Labor Law, adopted New York State Industrial Code Rule 420(f) (see Appendix herein, page 25), requiring all elevators, including this one since it falls within none of the excep-

tions, to be equipped with an interlocking device as defined by Rule 400 (see Appendix, page 23). The Court of Appeals specifically held (Appendix B, at page 33, of brief of petitioner), that this Rule 420(f) requiring such an interlocking device became applicable to the elevator in question here on its effective date of March 1, 1923, so that from that date in 1923, since there was no interlocking device on this elevator it "was operated in violation of the applicable regulations" which, undisputedly, have the force and effect of law.

Counsel for respondent agree with the statement on pages 4, 5, of the brief of petitioner as to how respondent entered the building on Sunday, October 8, 1961, and, in most respects, as to how the unfortunate accident occurred. In this connection, we wish to point out, as is noted by the petitioner on page 5 of its brief, that there was some light by natural daylight coming in through the transom above the street door, so that respondent herein (plaintiff in the trial court and appellee in the Court of Appeals) was not wandering around in complete darkness. We also fully agree with the admission, on page 5 of petitioner's brief, that this elevator was not and had never been equipped with an interlocking device which would have prevented opening of this elevator door unless the elevator car was at the landing in question.

We do not agree with the statement (page 4, petitioner's brief) that the respondent took no precautions of any kind to ascertain whether the elevator car was present when he reached over to attempt to turn on the light. We do not agree with the statements on pages 5 and 6—uttered as statements of fact when, of course, however, they involve questions of construction of New York law—that the con-

struction and maintenance of elevators in the City of New York was governed exclusively by the Administrative Code referred to. Nor do we agree, at all, that this elevator was "legally installed" prior to 1938, inasmuch as this elevator did not have any interlocking device which was required after 1923, pursuant to the "incorporating" regulation of the City Board of Standards and Appeals which was adopted in 1918 before this elevator ever was put into the building.

As part of the "statement of the case" on page 6 of its brief, petitioner makes the legal argument, not a statement of fact, that the Court of Appeals has disregarded both the legislative mandate and the case law of the State of New York in upholding the instructions of the trial court with the result of imposing upon the petitioner a responsibility from which it has been freed by the state law. As our argument below indicates, this is wrong; moreover, the points of state law involved are narrow and not the type of question for review of state law in which this Court will become involved by employing its discretionary power to grant the writ to decide great and serious issues.

Even farther from the scope of a granting of the writ is another legal argument (also contained on page 6 as part of the "statement of the case") where the petitioner contends that both Courts below were wrong in permitting the introduction of a photograph which happened to show that, after the accident, an interlocking device had been installed on the elevator door. In the first place, this is not a statement of fact but concerns a mere ruling on evidence, largely discretionary by the trial court, which the upper court on careful review found was not only not prejudicial, but not even erroneous. Furthermore, the in-

troduction of this evidence did not violate New York law, did not violate federal law, and was not—although so stated by petitioner—in conflict with the decision of this Court in the case of *Columbia & Puget Sound R. Co.* v. *Hawthorne* (1892), 144 U. S. 202, 36 L. ed. 405 which involved the permission into evidence of changes in a shaft around which a pulley revolved, after an accident. In that case this Court followed the usual general rule—which no one disputes under New York law or otherwise—that evidence is usually inadmissible to show subsequent repairs or changes. But the instant case does not involve the general rule. Rather it entails the equally well-known exception to that general rule (annotation, 170 A. L. R. at p. 43, supplemented in 64 A. L. R. 2d at p. 1311, §7), fully established by New York law (41 N. Y. Jur., Negligence, §106, p. 135, n.3 citing fourteen New York cases), that such evidence is admissible if it bears on a disputed issue of control. Showing the correctness of the rulings below, we respectfully refer this Court to the opinion written by Judge Medina, who is one of the greatest experts in the country on New York law, the rationale of the Court of Appeals on this point appearing in petitioner's Appendix B at pages 35 and 36 thereof.

Argument Against Granting the Writ

Petitioner starts off, at the bottom of its page 6, with the wild statement that the agreeing courts below have, by pure judicial fiat, made applicable to elevators installed in a building before 1938, the rules of the New York State Board of Standards and Appeals. This leap to the emotional conclusion that these rulings were based "on pure judicial fiat" is ridiculous. What the courts below did,

and did correctly, was to apply to this elevator, pursuant to a 1918 City Board Bulletin, which preceded the installation of the elevator, a State Board of Standards Rule as to interlocking devices which, as the Court of Appeals correctly and clearly pointed out, made the installation of this elevator a violation of safety rules from 1923 on.

Contrary to the somewhat inflammatory language employed by the petitioner on pages 7 *et seq.*, of its brief, there was no disregard of the language of the New York statutes, of 1916 or of 1937, nor was there any "unabashed exercise of judicial legislation." The opinion of the Court of Appeals, it is submitted, fully answers all arguments made by petitioner on pages 7, 8. Moreover, any rule of state law as to what "legally installed" means with respect to an elevator, involves only a somewhat narrow and specific point; and this Court should not undertake the burden of attempting to reassess the ruling of the two lower courts—both experts on New York law—as to what these statutory provisions and these Rules mean. With respect to the cases cited on page 9 of petitioner's brief, we wish to point out that the *Florentine* case, 340 F. 2d 239 (1965), the *Moran* case, 22 App. Div. 2d 779, 254 N. Y. S. 2d 33 (1964), and similar authorities were all cited to the Court of Appeals by the present petitioner on page 20 of its brief for that Court, and were distinguished for that Court by the present respondent—the appellee in that Court—in his brief before that Court, on page 14 thereof. This case of *Moran* v. *Abercrombie & Fitch Co.* (1964, First Dept.), 22 App. Div. 2d 779, 254 N. Y. S. 2d 33, really rests on the point that the testimony of the expert in that case did not sustain a finding of custom and practice therein. The true record in that case indicates that

there was a failure in the manner and matter of proof. There is no actual holding by the court in any way as to the requirement of a device on elevators, but merely a recital as to what an expert admitted was a proper installation. Furthermore, without any exception, the trial court therein had charged that the elevator was a proper installation and that there were no violations. But in any event, the question of state law is an extremely narrow one and it was correctly determined by both the trial court and by Judge Medina for the Court of Appeals.

Next, on page 9 of its brief, the petitioner flatly states that federal courts are required to apply state law even as announced by a court of first instance. This has little relevance to the instant brief since multiple decisions of courts of first instance in support of petitioner's position are not cited—but even so, the rule is stated too broadly. The true rule was stated by this Court in *King* v. *United Commercial Travelers,* 333 U. S. 153, 92 L. ed. 608, 68 S. Ct. 488 (1948), where Chief Justice Vinson carefully pointed out that trial court decisions are not an authoritated exposition of the "law" of a state where they do not have to be followed by courts of coordinate jurisdiction and may be ignored or disagreed with. As was pointed out in that case, 333 U. S. 153, at 161, 92 L. ed. 608 at 613: "It would be incongruous indeed to hold the Federal Court bound by a decision which would not be binding on any state court." Additional cases on the same point will be found in 36 C. J. S. Federal Courts, §174 (2), especially cases cited at page 410. That lower and trial court decisions are of only persuasive, but not controlling effect, upon another coordinate court under the law of New York, is clearly indicated in 1 Carmody-Wait 2d, Encyclopedia

of New York Practice, Chapter 2, "Courts and Their Jurisdiction," §2:58.

Again we point out that the Court of Appeals reasoned correctly in its construction and interpretation of the various New York statutes and Rules, notwithstanding the adverb "speciously" and the name calling indulged in by petitioner on pages 9, 10, 11 of its brief. At page 10 of its brief, petitioner apparently lays great stress on the case of *McCabe* v. *MacKay*, 253 N. Y. 440, 171 N. E. 699 (1930). An examination of this short opinion by Chief Judge Cardozo shows that it gives no comfort to petitioner herein. That case involved a duty imposed by the City Building Code as to installation of artificial light in the hall of a building, and the Court correctly held that it only applied to office buildings erected after its date, by the specific provision of a section of the Building Code therein involved. This has no application to the instant case, where, as the Court of Appeals pointed out, the elevator in question in this situation was in violation of the state Rules—the controlling rules in this case since the City has not superseded them—from 1923 on until the date of this unfortunate accident.

On page 11 of its brief petitioner lays great stress on the fact that no violation was placed upon the elevator since the time that petitioner has owned it, 1939. Similarly, on page 4, petitioner had pointed out that many thousands of such elevators are still in use in New York City. Thousands of "wrong installations" not complying with the law and the safety regulations do not make a violation into a right. If there are thousands of elevators without these interlocking devices, we submit that the owners thereof are merely fortunate that a great many persons have not been killed

or injured through failure to comply with the safety laws and rules. One might just as well argue that a driver of a vehicle driving down a street on the wrong side at 100 miles an hour, and causing an accident, should not be held liable for negligence because (1) he has been accustomed to driving that way for a long time—since 1939—without being arrested, and (2) because dozens of other people also drive 100 miles an hour down the wrong side of the street without any action being taken against them by way of sanctions, either civil or criminal.

Equally absurd is the contention, on page 11 of petitioner's brief, that because a witness testified that elevators erected prior to 1931 were not required to have a "parking device" as a matter of regulation, no interlock was required. It should be obvious, even to petitioner, that such an "expert" doesn't make the law, and that any lack of enforcement of a law will not affect either its existence, or a violation of it giving rise to evidence of negligence. As noted above, a series of violations does not cure any one of them.

The Proximate Cause Issue

On pages 12 and following of its brief, petitioner seeks to bring before this Court, as an important question which justifies the granting of a writ of certiorari, a contention that the two courts below made a mistake as to the trial court's instructions to the jury in the law of New York on proximate cause. Involved here is a simple question of state law, not a complicated one; and since it involves the correctness of the trial court's instructions in use of particular words or phraseology, it is also a narrow and relatively unimportant question of state law. It also involves, fundamentally, a question of fact which this Court will not

review over again. As the Court of Appeals held, in properly disposing of this rather inconsequential point, there was no error in the instructions on the subject of causation and New York law requires no magic formula or particular statement of the rule. If anyone is familiar with aspects of New York law such as are here involved, it is Judge Medina who wrote the opinion.

It is somewhat unbelievable, but petitioner is urging that, as a matter of law, the conduct of a co-employee, one Epstein, in placing the key to the elevator door back under the staircase—so that it was available for use by the respondent—instead of keeping it on his person when he had taken the elevator away from the first floor landing, constituted a complete intervening cause, breaking the chain of causation of petitioner's negligence in failing to have an interlocking device on the elevator.* It was certainly foreseeable—that when petitioner made this key freely available and also left an interlocking device off the elevator, that someone, after using the key, would put it back in its place where it was supposed to be kept.

The law of New York is clear, as stated in 41 N. Y. Jur., Negligence, §38, that the doer of an act is liable for harmful consequences brought about by intervening independent forces if their operation might have been reasonably foreseen, and that in such case there is no break in the chain of causation of such a character as to relieve the actor of liability, even though the intervening forces are deliberate and independent, but innocent acts of a human being.

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* This argument is made notwithstanding the fact that petitioner concedes that §316 of the Labor Law (Appendix 26) places a non-delegable duty upon the owner of a tenant-factory building. The act complained of as intervening is that of an employee of the tenant in the course of his employment.

A leading New York case which makes this clear is the frequently cited decision of *Carlock* v. *Westchester Lighting Company* (1935), 268 N. Y. 345, 197 N. E. 306. That case resulted in a reversal of a judgment for a defendant below, and involved a violation of a safety regulation, in this particular instance as to electric wires. Applying the well-known New York rule that neglect to obey the prohibition of a law or to perform its duty prescribed is some evidence of negligence to be considered by a jury in an action brought by one for whose protection the legislation was enacted to recover for any injuries of the character which the regulation was designed to prevent, the court further held, at page 349 of 268 N. Y., that the violation would seem to have been a proximate cause of the death or so the jury might have found, noting that several acts may occur to produce a result, one or more of which may be the proximate cause. Then the court added, at page 350 of 268 N. Y., page 308 of 197 N. E.: "Where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, there is no break in the chain of causation of such character as to relieve the actor from liability. This is so, even though they are deliberate and independent, but innocent, acts of a human being."

The first of these two sentences was quoted and applied, and with emphasis added, in the leading case of *Kingsland* v. *Erie County Agricultural Society* (1949), 298 N. Y. 409, 84 N. E. 2d 38, 10 A. L. R. 2d 1, an explosion case. The court, using the foregoing language, held that the issue of proximate cause in an explosion case where a child was injured was properly left to the jury, further that it could not hold as a matter of law that the conduct of the child's

mother broke the chain of causation, and that that also, at most, was a matter of fact for the jury.

Applying these principles here, it is obvious that the trial court correctly instructed the jury as to the effect, if any, of Epstein's activities, and that the Court of Appeals correctly affirmed.

There is nothing novel about the New York law on these problems. The law is simple and pretty well settled, the issues being primarily factual. To the same basic effect as the New York decisions already cited, see American Law Institute, Restatement of the Law, Torts 2d, §§447, 449, and the numerous cases cited in the Appendix thereto at pages 220 *et seq.*, 245 *et seq.*

An important New York case which directly follows the Restatement principles is *Foley* v. *State* (1943, Fourth Dept.), 265 App. Div. 682, 41 N. Y. S. 2d 256, at 260, citing with approval the same sections in the original Restatement of Torts, and the *Carlock* case, *supra.* In holding that the State could be held liable for failure of a red traffic light, it was declared apparent that the absence of the red light not only contributed to an accident that followed, but it was reasonably foreseeable that some such accident would occur without such red light functioning. The court added that the mere fact that the acts of drivers of cars intervened "did not necessarily create a superseding cause"; that this was particularly so where the original wrongdoer could have anticipated that the intervening acts might naturally follow the original wrongful acts; and that the mere fact that the negligence of the State alone was not enough to produce the injury, without the cooperation of the drivers, did not break the chain of causation or relieve the State from liability. So, too in this case, the mere fact that

Epstein put the key back "did not necessarily create a superseding cause," particularly where petitioner, the original wrongdoer, could have anticipated that someone using that key might have put it back and that such might naturally follow petitioner's original wrongful act in not having the interlocking device to make the elevator and its shaft safe.

On pages 12, 13, in order to fault the two lower courts in New York law application, petitioner lays particular stress on the *McLaughlin* and *Rivera* cases. This confidence is misplaced, since these cases do not render erroneous the instructions of the trial court or the affirmance by the Court of Appeals.

McLaughlin v. *Mine Safety Appliances Company*, 11 N. Y. 2d 62, 181 N. E. 2d 430 (1962), involved an instruction as to intervening cause and foreseeability which was held erroneous. The case is distinguishable clearly, because the jury could have believed that the act of the fireman there, which might have been found to have been an intervening cause, might have deprived the nurse who was using the defendant's heating blocks of any opportunity she might have had to read the instructions printed on the containers (for the small print of which the defendant was sought to be held liable for failure to warn); and the jury also might have found that the fireman actually activated these blocks and had turned them over, uninsulated, to the nurse for her use. As the reviewing court noted, the trial court should have charged that if the fireman did so conduct himself, without warning the nurse, *his negligence was so gross* as to supersede the negligence of the defendant and thus to insulate it from liability. Moreover, the jury might have found that the fireman not only had the means to warn the nurse, but further, by his actions, he prevented any warning

from reaching her, and indeed, that he actually had some part in the improper application of the blocks—conduct which could not have been foreseen by the defendant. Obviously, there are two distinctions. In the first case, the mere act of Epstein in restoring the key to its usual place of repose, if negligent, cannot be said to be so gross as to supersede the negligence of the petitioner in failing to have the interlocking device on the elevator; furthermore, everything that Epstein did was easily and readily foreseeable.

Wide of the mark, also, is *Rivera* v. *City of New York* (1962), 11 N. Y. 2d 856, 227 N. Y. S. 2d 676, 182 N. E. 2d 284, where, in a memorandum decision, the court held it clear that defendant's asserted wrongdoing was not the proximate cause of the accident. The defendant there was sued for asserted defective condition of the plumbing and of a bathtub, after a child slipped and fell into a tub filled with very hot water. The court noted that the hot water created specific injuries for which the damages were sought, but held that it did not cause the intervening act which was deemed not foreseeable. The act not foreseeable was that the child was attempting to balance itself on the curved edge of the bathtub, and fell in because of the slipping of a wet boot. Obviously, a landlord furnishing plumbing and hot water cannot reasonably foresee that someone would attempt to walk around the curved edge of a bathtub. But the defendant-petitioner, which here furnished the key for use by the tenant, could easily foresee that someone like Epstein, after using the key, would return it to its intended place of repose, with the result that another user, like the unfortunate plaintiff-respondent herein, might be injured or killed from falling into the elevator shaft because no interlocking device had been employed.

There is no doubt that this point entails no complicated question of New York law, and that, moreover, it was correctly decided below. It must be kept in mind that the failure of petitioner to have this interlocking device was the original and constantly continuing negligent act—it was either the sole act of negligence, or it was concurrent with any activity of Epstein in replacing the key, without any break in the chain of causation.

Evidence

Where is there any important and significant question of state law, in the evidence point (previously mentioned in this brief) raised again by petitioner on pages 14 *et seq.*, of its brief? The contention is that the lower court erred, and that the Court of Appeals affirmed the error, in permitting admission of a photograph indicating that after the happening of the accident, the petitioner did install an interlocking device.

We have already discussed the *Hawthorne* case, 144 U. S. 202, which merely followed the general rule, as above stated, that no one disputes, that evidence is inadmissible merely to show a change or repair after an accident. But as noted above (page 8) all this was properly explained by the Court of Appeals, in its opinion, as indicated in petitioner's Appendix B, at pages 35 and 36. The trial judge, by instruction, made it clear to the jury that any use of such so-called evidence was related to an issue of control; and, as the Court of Appeals declared, the issue of control had not been completely removed from the case. The point is really an immaterial one, and certainly not the type of issue upon which certiorari is granted by this Court to settle important and outstanding questions of law.

Contributory Negligence

Another minor question of state law, in fact primarily a question of fact, which petitioner nevertheless seeks to have this Court review, is as to the possible contributory negligence of respondent and his burden of proving that the injury did not result from negligence on his part. This is raised on pages 16, and following, of petitioner's brief. Moreover, to pinpoint the insignificance of the claim, petitioner itself admits, at page 19 of its brief, that it did not challenge the charge to the jury on the question of contributory negligence. It is seeking to have this Court determine on a second appeal as to the weight of evidence, which this Court does not review, whether the plaintiff-respondent had carried the burden of proof imposed upon him to prove his freedom from contributory negligence. One review of the facts is all to which petitioner is entitled.

In this case, the point as to proof of freedom from contributory negligence was obviously so insignificant to Judge Medina and his associates on the Court of Appeals, that the matter was disposed of summarily in one sentence in their opinion, when they stated (petitioner's Appendix B, at page 36): "We think the issue of contributory negligence was clearly for the jury to determine." If there is any issue of state law which this Court will not review, and which does not constitute an "important question of state law," it is one as to sufficiency of evidence where both courts below have held in favor of plaintiff on an issue of contributory negligence.

CONCLUSION

Not only is the decision here not in conflict with the *Moran* case (1964), 22 App. Div. 2d 779, 254 N. Y. S. 2d 33, previously discussed herein and which was cited to the Court of Appeals in the briefs of both parties in that court, but no question of state law of any great significance or importance whatsoever is presented by this record. Petitioner has had a fair trial. It was tried by a jury which unanimously found against it on a jury charge which was found to be completely free from error. After careful consideration, the judgment against it was unanimously affirmed by a Court of Appeals consisting of Judges Medina, Friendly and Smith. One of the leading authorities on New York law of this century is Judge Medina. Certainly he and his distinguished associates were cognizant of the New York law questions presented by this record. They gave them careful consideration, and decided them correctly. The petitioner is seeking to have this court review narrow questions of state law, relatively insignificant questions of state law, questions of fact, immaterial rulings on evidence already decided correctly by two lower courts, and questions as to weight of evidence. This is exactly the type of review which will not be made by this Court in the exercise of its discretionary functions with respect to the writ of certiorari.

For the foregoing reasons, the petition for certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

STUART M. SPEISER
Attorney for Petitioner

Dated: New York, New York
April 26, 1967.

CHARLES F. KRAUSE
WILLIAM F. X. GEOGHAN, JR.
ALFRED W. GANS
On Brief in Opposition

APPENDIX A

Additional Bulletins and Rules Involved

1918 Bulletin of City Board of Standards and Appeals

Every elevator * * * within the City of New York, in addition to conforming to all provisions of the labor law, building code or other laws or ordinances as are applicable thereto, shall comply with the provisions of these rules. 3 Bull. Board of Standards & Appeals 955 (1918).

State Labor Department Rules

Part 1—Power Driven

Definitions

(See Part II for Definitions of Hand Power Elevators, Hand Power Dumbwaiters and Hand Power Hoists.)

Rule 400. Whenever used in these rules "approved" means approved by the Industrial Commissioner.

* * * * *

"Interlock." An interlock is a device which shall:

1. Prevent the movement of the car:

(a) Unless only that hoistway door or doors, opposite which the car is standing, are closed and locked (Door Unit System); or

(b) Unless all hoistway doors are closed and locked (Hoistway Unit System).

2. Prevent the opening of a hoistway door or doors from the landing side:

(a) Unless the car is standing at that landing, and—

(b) Unless the car is coasting past the landing with its car-control mechanism in the STOP position.

Hoistway Doors and Gates for Passenger and Freight Installation

In Factory Buildings erected before October 1, 1913.

In Mercantile Establishments erected before November 1, 1920.

Operation

Existing Installations

Rule 420. (a) Self-closing doors or gates that open or close with a swinging motion installed before November 1, 1920, may remain in place, if the hoistway entrance is provided with a vertical sliding, auxiliary gate, self-closing, not less than 66 inches high, constructed in accordance with Rule 421.

Future Installations

(b) Hoistway doors or gates to elevator landings that open or close with a swinging motion shall be manually operated.

(c) All doors or gates used on hoistways shall be set substantially flush with the hoistway line.

(d) Horizontal sliding hoistway gates of the collapsible type will not be permitted.

All Installations

(e) In existing and future installations doors or gates at landings shall be manually operated, self-closing or power driven.

Exception: Full automatic doors or gates will be permitted at the terminal landings for freight elevators operating at a speed not exceeding 75 feet per minute and at all landings of freight elevators used exclusively for automobiles.

(f) All manually operated hoistway doors or gates shall be provided with an interlock or electric contact as specified in Rules 454 and 455, or other approved device performing similar functions.

Exceptions:

1. Where freight hoistways provided with sliding doors or gates are equipped with operating or controlling devices that are not designed to coordinate with approved interlocks or electric contacts so as to provide safe conditions, or where, because of hoistway or elevator structural conditions, there are difficulties in effecting installations for the reliable operation of such devices, the Industrial Commissioner may permit in lieu thereof such other safeguards or conditions as will in his opinion provide reasonable safety.

2. Sliding doors or gates on hydraulic passenger elevators, equipped with a self-closing device which is not actuated by the movement of the car.

(g) Where electric contacts are installed, they shall be located so as to insure the door or gate being locked or latched when or before the contact is closed.

(h) All manually operated and all self-closing hoistway doors or gates shall be locked or latched when the car is not at the landing.

Section 316 of the New York Labor Law

§316. Duties of owners and occupiers

1. Except as in this article otherwise provided, the person operating a factory, whether as owner or lessee of the whole or a part of the building in which the same is situated or otherwise, shall be responsible for the observance of the provisions of this article, anything in any lease or agreement to the contrary notwithstanding.

2. The owner of a tenant-factory building, whether or not he is also one of the occupants instead of the respective tenants, shall be responsible for the observance of the following provisions of this article, anything in any lease to the contrary notwithstanding:

Section two hundred and fifty-five, elevators and hoistways; section two hundred and seventy, construction of buildings erected after October first, nineteen hundred and thirteen; section two hundred and seventy-one, requirements for buildings erected before October first, nineteen hundred and thirteen; section two hundred and seventy-two, additional requirements for all buildings, except subdivision one and the first three sentences of subdivision three; section two hundred and seventy-three, fire escapes erected after October first, nineteen hundred and thirteen, on build-

ings theretofore erected; section two hundred and seventy-four, fire escapes erected before October first, nineteen hundred and thirteen; section two hundred and seventy-nine, fire alarm signal systems and fire drills; section two hundred and eighty, automatic sprinklers; section two hundred and ninety-two, drinking water; section two hundred and ninety-three, washrooms, except subdivision two thereof; section two hundred and ninety-five, water closets. Except that the tenants shall also be responsible within their respective holdings for the observance of the provisions of the following sections: section two hundred and fifty-five, elevators and hoistways; section two hundred and seventy, construction of buildings erected after October first, nineteen hundred and thirteen; section two hundred and seventy-one, requirements for buildings erected before October first, nineteen hundred and thirteen; section two hundred and seventy-two, additional requirements for all buildings; section two hundred and seventy-three, fire escapes erected after October first, nineteen hundred and thirteen, on buildings thereofore erected; section two hundred and seventy-four, fire escapes erected before October first, nineteen hundred and thirteen.

The owner shall also be responsible for all other provisions of this article in so far as they affect those portions of the tenant-factory building or its premises that are used in common or by more than one occupant.

3. The tenant of any part of a tenant-factory building shall permit the owner, his agents and employees to enter and remain upon the demised premises whenever and so long as may be necessary to comply with the provisions of law, the responsibility for which is by this section placed

upon the owner; and his failure or refusal so to do shall be a cause for dispossessing said tenant by summary proceedings to recover possession of real property. Whenever by the terms of a lease any tenant has agreed to comply with or carry out any of such provisions, his failure or refusal so to do shall be a cause for dispossessing said tenant by summary proceedings as aforesaid. L. 1921, c. 50; amended L. 1941, c. 33, §6; L. 1962, c. 310, §250, eff. Sept. 1, 1963.